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No. 444

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIAM WORTHY, JR., *Petitioner*

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is as yet unreported. It is set forth in Appendix A to the petition, at pp. 27-41.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1959 (Pet. App. C, p. 49). On August 26, 1959, Mr. Justice Black entered an order extending the

time for filing the petition for certiorari to and including October 4, 1959. The petition was filed on September 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Government, in the conduct of foreign policy, may restrict the travel of its citizens in the portion of China under Communist control by limiting passports to exclude that area.

2. Whether the petitioner was illegally discriminated against by reason of the refusal of the Government to lift the travel ban as to him when it permitted a limited number of correspondents designated by certain news-gathering organizations as their representatives to go to Communist China.

3. Whether the Secretary of State may refuse to renew the passport of a person who, in the past, has violated restrictive endorsements contained in his passports, and who refuses to give assurances that he will not violate such restrictions in the future.

STATUTES AND REGULATIONS INVOLVED

1. 22 U.S.C. 211(a) provides:

> *Authority to grant, issue, and verify passports.*
>
> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate

and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. 22 U.S.C. 1732 provides:

Release of citizens imprisoned by foreign governments.

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress. (R.S. § 2001.) [Derived from the Act of July 27, 1868, c. 249, § 3, 15 Stat. 223, 224.]

3. The pertinent portion of Executive Order No. 7856 (March 31, 1938), 3 F.R. 799, 805, as codified in Title 22, C.F.R., reads as follows:

PART 51—PASSPORTS

Subpart A—Regulations of the President

* * * * *

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against

use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

4. The pertinent provisions of the regulations issued by the Secretary of State, as codified in Title 22, C.F.R., are as follows:

PART 51—PASSPORTS

Subpart B—Regulations of the Secretary of State

* * * * *

§ 51.136 *Limitations on issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

STATEMENT

The petitioner, a United States citizen, applied for and was issued a United States Passport, No. 558363, on March 4, 1955. The passport contained the following limiting and restricting endorsements (R. 96-98):

1. This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria, and those portions of China, Korea and Viet-Nam under Communist control.

2. This passport is not valid for travel in Hungary.

Similar limitations were included in all passports issued at, or about, that time (R. 81, 83).

Prior to the passport's expiration date on March 4, 1957, the petitioner applied for a renewal on February 25, 1957. This application was denied by the Department of State on March 29, 1957, pursuant to 22 C.F.R. 51.136 (*supra*, p. 4). The denial was contained in a letter to the petitioner by the Director of the Passport Office, and was grounded on petitioner's travel in Communist China and Hungary in violation of restrictive endorsements contained in his passport, and the Department's reason to believe that he would not abide in the future by geographical limitations of general applicability which might be placed in the passport (R. 8-9). The petitioner subsequently availed himself of his right under the applicable passport regulations (22 C.F.R. 51.137) to an informal hearing, following which the Acting Director of the Passport Office advised him that the original decision was adhered to (R. 16-20). The petitioner appealed this decision to the Board of Passport Appeals pursuant to 22 C.F.R. 51.138. At the formal hearing before the Board, held on December 10, 1957, the petitioner did not appear, but by voluntary choice was represented by his attorney. The evidence adduced at the hearing can be summarized as follows:

At all times material to the controversy here involved, the petitioner was a newspaper reporter employed by the "Afro-American" newspapers (R. 3, 124). He had applied for, received, and used passports issued by the Department since 1951 (R. 2, 126-127). On several occasions, commencing about the end of 1953, the petitioner had endeavored to obtain a visa from the Chinese Communist regime which would

permit him to enter the mainland of China (R. 17), but the authorities there insisted upon a valid American passport prior to issuing a visa (R. 130, 228). Continuing at intervals since April 1953, the petitioner made several oral and written requests to the Department for a validated passport which would enable him to travel to Communist China, but all such requests were refused by the Department (R. 17).

In August 1956, the petitioner was informed by the Secretary of the Information Department of the Foreign Ministry of the Communist Chinese regime that his application for a visa had been granted, and that the visa could be obtained at any time from August 20 to August 30 at Shumchon, or at the Moscow Embassy of the Chinese People's Republic (R. 160). He was further asked, in the event that he chose to go to Shumchon to claim his visa, to forward immediately his passport number, and to get in touch with "Intourist," Canton, for travel accommodations (*ibid.*). The petitioner does not recall having taken any action pursuant to this request (R. 161, 165-166).

Early in December 1956, the petitioner obtained a transit visa for Hong Kong from the British Consulate in Boston, Mass. (R. 18). On the 16th of the same month he received a cable from the Chinese Communists, authorizing him to visit the mainland (*ibid.*). Four days later the petitioner obtained a visa for Hong Kong, valid for six months, at the British Consulate in New York City (*ibid.*), and he departed from the United States on December 22, arriving in Hong Kong on the 24th (R. 157, 167). A few hours after his arrival, he departed for the mainland of China (R. 18). The petitioner's passport was endorsed by the British authorities at the Lo Wu control point (R. 172), and he

exhibited his passport upon entering the territory under Communist Chinese control at Shumchen (R. 18, 90, 173).

The petitioner remained in Communist China for a period of forty-one days (R. 18). While there, he obtained a visa "in transit to America by way of Irkutsk" (*ibid.*) from the embassy of the U.S.S.R. in Peking, and an entry visa for Hungary from the Hungarian embassy in Peking (*ibid.*). Arriving in Moscow, U.S.S.R., from Communist China on February 5, 1957, the petitioner was interviewed by officials of the United States embassy who, having obtained advance notice of his itinerary, drew his attention to the fact that his passport was not validated for travel to Hungary (R. 18, 193). Nevertheless, the petitioner did enter Hungary two days later. In Budapest, he was again interviewed by a United States embassy official, and he was asked to surrender his passport (R. 198, 202).[1] The petitioner refused; he returned to the United States on February 10, 1957 (R. 206).

During the course of the hearing before the Board of Passport Appeals, at which the facts above summarized were presented, counsel for the Board invited the petitioner's attorney to inquire of the petitioner whether he would be willing to attest that if his passport were renewed he would not travel in violation of the restrictions contained therein, even if ordered

[1] The petitioner is reported to have stated to the press at that time:

> To hell with the restrictions. I wanted to come to Budapest in line of duty. Aside from the Red China thing, I believe they would have let me come. This time I intend to make a stand for it.

When asked if he made such statement, the petitioner replied: "I can't vouch for the accuracy of that quote. • • • I won't deny that those were my sentiments at the time" (R. 203).

to do so by his employer (R. 94-95). By letter, the petitioner's counsel advised the Board that the petitioner could not "in good conscience" answer the question (R. 95); the letter continued (*ibid.*):

> The inference raised by this question is that Mr. Worthy would receive his passport if he agreed to abide by what he considers an unconstitutional restriction. In Mr. Worthy's own words to me, "even the most savory carrot cannot make a free man trot", and he is unwilling to make any commitments to the State Department which would in any wise compromise his basic position that it does not have the right, constitutionally, to restrict travel by American citizens except under the most extreme conditions, none of which are present in this case.

On the basis of the evidence established at the hearings, and the admissions of counsel made subsequently, the Secretary of State, on March 24, 1958, notified the petitioner that his passport renewal application was denied (R. 20-21). The attached statement of "Decisions and Findings" by the Secretary read in part (R. 24):

> On the basis of past conduct and other evidence of future intent, I have reason to believe that William Worthy, Jr., would, if his passport were renewed, violate limiting and restricting endorsements contained therein, necessitated by foreign policy consideration[s]. Accordingly, I have concluded that his activities abroad, at this time, would be prejudicial to the orderly conduct of the foreign relations of the United States. I have reached this conclusion on the foregoing findings which are based on information contained in the open record, including, applicant's own statements.

> The passport renewal application of William Worthy, Jr., is therefore denied under Section 51.136(2) of the Passport Regulations and in order to promote and safeguard the interests of the United States.

In August 1957, while the administrative proceedings in this case were pending, the Secretary of State decided to permit travel of a limited number of United States news representatives to Communist China on an experimental basis, to provide for direct reporting by the American press about internal conditions on the Chinese mainland. To implement this experimental program, the Department of State requested each news-gathering organization (approximately 40) which had demonstrated sufficient interest in foreign news coverage to maintain at least one full-time American correspondent overseas, to designate, if it chose, a correspondent for the Chinese mainland for a period of six months or longer. To this request by the Department, twenty-four news-gathering organizations (see also the Appendix, *infra*, p. 14) responded initially, and each selected one correspondent to represent it in Communist China. The State Department thereupon validated the passports of the newsmen so designated for travel to those portions of China under Communist control. With one exception,[2] the Communist Chinese regime has continuously refused to allow any

[2] John Strohm, a representative of Newspaper Enterprise Ass'n, Inc., of New York City, was granted entry by the Communist Chinese and visited the mainland from September 8 to September 30, 1958.

The Department of State advises that in only three other instances since 1952 have Americans received validated passports for travel to the Chinese mainland, and have actually entered the mainland pursuant thereto, *viz.*, (1) in December 1954, the per-

of these news correspondents to enter the Chinese mainland.

The petitioner's name has not been submitted to the Department by any organization as its choice of a correspondent to represent it on the Chinese mainland.

The petitioner filed a complaint in the District Court on April 9, 1958 (R. 2-8), seeking, *inter alia*, a declaration that as an American citizen he was entitled to a passport as a matter of constitutional right, that the regulations under which the Secretary of State had acted were illegal, and that as a newspaper reporter he had an additional right under the First Amendment to a passport; in addition, he also sought an order directing the Secretary to renew his passport forthwith (R. 8). On October 6, 1958, on motion by the petitioner, and cross motion by the respondent, for summary judgment (R. 28, 89), the respondent's motion was granted (R. 101). Holding that the President "may properly restrict the travel of certain citizens to certain designated geographical areas of the world when necessitated by foreign policy considerations," the District Court concluded:[3]

> Now, a passport renewal may validly be denied to a person who, after a hearing, the Secretary of

---

sonal aide to the Secretary General of the United Nations proceeding to Peking under United Nations mandate to seek the release of American airmen of the United States Command in Korea held prisoners of war; (2) in November 1957, an attorney to obtain evidence for the defense of his clients charged with sedition; and (3) immediate family members of persons illegally incarcerated by the Chinese Communists.

[3] Excerpt from the oral opinion by District Judge Edward M. Curran, rendered on October 2, 1958; Transcript pp. 46-47 (not part of record.).

State has concluded would engage in activities in foreign countries prejudicial to the orderly conduct of foreign relations, because the Secretary has reason to believe on the basis of his past conduct and evidence of his future conduct that he would, if his passport were renewed, violate the restricting endorsements contained therein. Under the circumstances of this case, the refusal of the Secretary of State to issue a passport to the plaintiff does not violate his rights under the First amendment.

The Court of Appeals unanimously affirmed the judgment of the District Court (Pet. App. A, pp. 27-41).

ARGUMENT

1. The issues involved in the first two questions presented in this case are identical with those involved in *Frank* v. *Herter*, pending on petition for a writ of certiorari, No. 445, this Term. Insofar as these questions are concerned, the variations in the underlying facts are immaterial. Therefore, we respectfully refer the Court to our brief in opposition in that case. For the reasons there expressed, we urge that these questions were properly decided by the court below and should not be reviewed here.

2. As to the third question, whether under the circumstances of this case the Secretary of State was justified in refusing to grant the application for a renewal of the petitioner's passport, that issue is not involved in *Frank* v. *Herter*. However, we urge that it was correctly decided below and that there is no occasion to scrutinize that decision.

Our review of the uncontested facts appearing in the record demonstrates that the petitioner not only know-

ingly and wilfully violated the travel limitations in his expired passport, but that at the very time he was applying for renewal he refused to give any assurance that he would not violate any limitation in the renewed passport. See *supra*, pp. 7-8. Thus, the basis for the action of the Secretary was the deliberate defiance by the petitioner of limitations generally applied by this government on all passports. In the narrow respect that this case involves the refusal to renew a passport, rather than the mere inclusion of travel limitations in an issued passport, the case arises from a situation similar to that involved in *Kent* v. *Dulles*, 357 U.S. 116. However, the conduct of the petitioner on the basis of which he was denied a passport is closely allied to the class of cases in which the Court in *Kent* recognized a refusal as appropriate, *i.e.*, when an applicant "was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127. While the petitioner has not been charged with a violation of the criminal law, his refusal to give assurance of future compliance with the passport limitations is certainly in direct conflict with the foreign policy of the United States.[4] While the petitioner has

[4] The Department of State has taken the position that if the petitioner were formally to indicate his intention to abide by the geographical restrictions placed in passports issued to American citizens, the Department would promptly reissue him a passport, assuming no information were then available which would tend to contradict his declared intentions. And the court below noted (Pet. App. A, pp. 39-40):

> Worthy errs when he assumes that the Secretary has forbidden him to travel at all or that the action "is tantamount to imprisoning him." Worthy, so far as this record shows, can have a passport to travel all over the world except in certain designated areas. * * *

every right to disagree with that policy, he has no legal right to require the Secretary of State, by granting him a passport, to take affirmative action to aid or authorize him to violate that policy. So long as he refuses to abide by the restrictions the Secretary lawfully imposes, the petitioner cannot expect to be given the very means by which he can flout those limitations. And, in fact, he does not separately attack the action of the Secretary in refusing the renewal of his passport, apart from the alleged invalidity of the limitations in his passport.

The procedural rights of the petitioner were fully protected. He was given full notice of the basis for the refusal of his passport application and a full hearing on notice to develop all the facts. The petitioner does not allege any denial of due process in the procedures followed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Assistant to the Solicitor General.

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Attorneys.

NOVEMBER, 1959

APPENDIX

According to information received from the Department of State, the following news-organizations have been accredited to send reporters to Communist China as of October 1959:

Organization	Designee
American Broadcasting Company	Falk, Raymond F.
Associated Press	Edwards, Forrest
Baltimore Sun	Potter, Philip
Chicago Daily News	Beech, William Keyes
Chicago Tribune	Manly, Chesly
Christian Science Monitor	No designee
Columbia Broadcasting System	Searls, Guy W.
Copley News Service	Brines, Russell
Cowles Magazines	No designee
Denver Post	Hosokawa, William K.
Encyclopedia Britannica	Benton, William
Fairchild Publications	Gilkerson, Yancey Sherard
McGraw Hill	Sanders, Sol W.
Minneapolis Star & Tribune	Grim, George Howard
Mutual Broadcasting System	Lewis, Fulton, Jr.
National Broadcasting Company	Robinson, James G.
National Geographic Magazine	No designee
Newspaper Enterprise Association	No designee
New York Herald Tribune	Steele, Archibald T.
New York Times	Durdin, Frank Tillman
Newsweek	Elegant, Robert S.
North American Newspaper Alliance	Forman, Harrison
Reader's Digest	Michener, James
St. Louis Post Dispatch	Childs, Marquis William
Saturday Evening Post	Bess, Demaree
Scripps Howard	Russell, Oland Dale
Time, Incorporated	Burke, James Cobb
United Press International	Shapiro, Henry
U.S. News and World Report	Martin, Robert W.
Wall Street Journal	Oganesoff, Igor
Westinghouse Broadcasting Company	Sheean, James Vincent

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